

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1192

7

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to be argued by
STEVEN LLOYD BARRETT

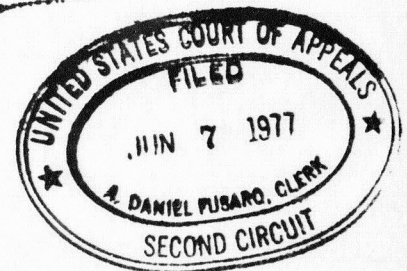
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
JOSE ROSA, JOSE VEGA, and
RAFAEL RODRIQUEZ,
Defendants-Appellants.
-----X

B
P/s

Docket No. 77-1192
Docket No. 77-1193
Docket No. 77-1219

APPENDIX TO THE BRIEF
FOR APPELLANT JOSE VEGA



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOSE VEGA
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

CRIMINAL JUSTICE - DISTRICT COURT
OFFENSE PO JUDGE/MAGISTRATE Assigned U.S. 02- VEGA, JOSE a/k/a
OFFENSE MD 0861 vs. Jose Hernandez
MEANOR Mis 0208 01 District Office
DELINQ Fel X District Office
Case Filed 07:15 76 0655 02
No. of Days * 03
JUVENILE
U.S. MAG. CASE NO. 76-41
F.A.I.L. - RELEASE
AMT. ☐ Fugitive
Denied ☐ Set ☒ Pers. Recog.
S 1, 000 ☐ PSA
Date 4/1/76 ☒ 10% Deposit
☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd Ptry Cust ☐ Other

U.S. TITLE SECTION
21:846
21:812, 841
OFFENSES CHARGED
Consp. to viol. Fed. Narco. Laws.
Possess. & distr. of Heroin I.
ORIGINAL COUNTS
1
2, 3
H/22

II. KEY DATES & INTERVALS

ARREST or ☒ INDICTMENT ☒ ARRAIGNMENT ☒ TRIAL
U.S. Custody Began 12:00 noon 3/31/76
Summons Served
First Appearance
High Risk Date 7-15-76
Indict. Waived
In Charging District
Superseding ☐ Indict/info ☐
1st Plea 7-22-76
Final Plea
Trial Set For 1-10-77
Vair Dire ☐
Trial Began 1-13-77
Trial Ended 1-13-77
Disposition of Charges
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On Government's Motion
☐ On All Charges
☒ On Lesser Offenses
☐ WOP: ☐ WP

MAGISTRATE
Search Warrant Issued
Summons Issued
Arrest Warrant Issued
COMPLAINT 4/1/76 HJR-080D
OFFENSE (In Complaint) 21 USC- 812,841(a)(1) and 841(b)(1)(A) - NARCOTICS
INITIAL APPEARANCE DATE 4/1/76
PRELIMINARY EXAMINATION OR REMOVAL HEARING
Date Scheduled 4/28/76
Date Held
Tape Number
OUTCOME: ☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.
John Siffert
Arian Levine
791-0932 1922

ATTORNEYS
Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CO
Dan Steinbock

-1122

* Show last names and suffix numbers of other defendants on same indictment/information.
01-ROSA, 03-RODRIGUEZ
DATE (DOCUMENT NO.) PROCEEDINGS EXCLUDABLE DELAY (a) (b) (c) (d)
4/1/76 Complaint filed, Legal Aid assigned. Defendant released on bail, address: 1589 E. 172nd St., Bx., N.Y., depositor: Nereida Ramon, address: 244 E. 106th St., N.Y.
7/15/76 Indictment filed, 76 Cr. 655
7-22-76 Deft. and atty. not present. Court directs entry of not guilty plea. Mot. ret. in 10 days. Bail fixed in the sum of \$1,000. P.R.B. sec. by \$100. continued. Case assigned to Judge Conner for all purposes. Conner, J.
7-23-76 Filed the following papers received from Mag. Raby (Mag. No. 76-412) criminal complaint, SDNY, disposition sheet, financial affidavit, Appearance bond in the sum of \$1,000.00-\$100.00 CASH)
9-29-76 Filed affdvt. & notice of motion to suppress physical evidence and statements.... Ret. 9-30-76..
9-30-76 Deft. & atty. present.. Suppression hearing - decision reserved. 3 9-30-76 E 1 Conner, J.....

DATE	76Cr.655 W.C.C.	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
		(DOCUMENT NO.)		Inter- view Date	Start Date End Date	File Date	File Date
10-15-76	Filed defts memorandum of law....						
10-18-76	Filed deft's supplement to brief.						
11-10-76	Filed memorandum and order. Upon defts motions to suppress prosecution evidence derived from a search and seizure that attended their arrest, an evidentiary hearing was held.*** For the reasons discussed above, deft's motions are in all respects DENIED.....CONNER,J..mailed notice to all parties.						
11-12-76	Deft. present with atty's. Interpreter Richard Schoen sworn. Motion to suppress...DENIED. Pre-trial conf. set for Nov.24-76 at 9:30 A.M.....Conner,J....						
11-12-76	Filed Govts memorandum of law.						
12-13-76	Filed transcript of record of proceedings dated:9-30-76.						
12-27-76	Filed notice of motion to dismiss indictment...Ret.1-10-77...						
*11-24-76	Deft & atty present - Interpreter Richard Schoen sworn.Trial date set for Jan.10,1977. at 10A.M. CONNER,J						
1-6-77	Filed waiver of trial by jury...Approved...Conner,J.						
1-10-77	Deft. (Atty present) Interpreter Richard Schoen sworn. Deft Vega Re:Waiver of Trial by jury - Granted Deft Vega \$1,000 P.R.B. Secured by \$100.00 CASH Cont'd Special condition of Bail that deft contact U.S.Atty or Probation Dept. weekly. Deft to notify U.S. Atty of new change of address or if deft should leave his apartment for more than a day at a time.CONNER,J						
1-10-77	Filed Waiver of Trial by Jury,Approved:CONNER,J						
1-13-77	Atty present to suppress hearing held						
1-13-77	Deft.& atty.present..SUPPRESSION hearing..Decision..Deft GUILTY in Ct.2 P.S.I. ordered adjd to 2-24-77 9:30 a.m. deft to report or call pre-trial service once a week..All defts cont'd. on present bail..Interpreter Richard Schoen,sworn...Conner,J....						
4-11-77	Filed transcript of record of proceedings dated:1-10-77.						
3-17-77	Filed transcript record aof proceedings dtd: 3-3-77						

cont'd on page 3.

FINE AND RESTITUTION PAYMENT					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE

PROCEEDINGS

4-21-77 Filed Judgment (Atty. Edward Chase, present) the deft is committed for imprisonment for a period of THREE YEARS, on Ct. 2. Deft is placed on SPECIAL PAROLE for a term of THREE YEARS, to commence upon the expiration of his confinement pursuant to the provision of Ti. 21, U.S. Code, Section 841. Cts. 1 and 3 are dismissed on motion of defts counsel, with the consent of the Govt. Bail cont'd. pending appeal. Conner, J. Ent. 4-21-77.

4-22-77 Filed NOTICE OF APPEAL of deft from Judgment filed 4-21-77.
m-copy to: Federal Defender Services Rm. 509. Fed. Courthouse,
NYC and copy to U.S. Attorney.

ALM:trs
H-1025

76 CRIM. 0655

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

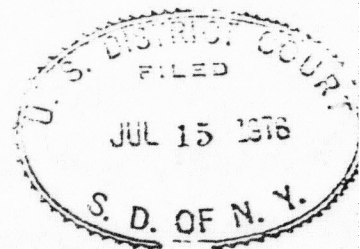
- v - :

JOSE ROSA, a/k/a Jose Miguel
Rosa Ortiz, JOSE VEGA, a/k/a
Jose Hernandez, and RAFAEL A.
RODRIGUEZ,

Defendants. :

INDICTMENT

76 Cr.



COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of March, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOSE ROSA, a/k/a Jose Miguel Rosa Ortiz, JOSE VEGA, a/k/a Jose Hernandez, and RAFAEL A. RODRIGUEZ, the defendants and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841 (b) (1)(A) of Title 21, United States Code.

B

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about March 31, 1976 defendants JOSE ROSA a/k/a Jose Miguel Rosa Ortiz, and JOSE VEGA, a/k/a Jose Hernandez, had a meeting.

2. On or about March 31, 1976 defendants JOSE ROSA, a/k/a Jose Miguel Rosa Ortiz, JOSE VEGA, a/k/a Jose Hernandez, and RAFAEL A. RODRIGUEZ met in the vicinity of 244 East 106th Street, New York, New York.

3. On or about March 31, 1976, while in the vicinity of apartment 9 of 244 East 106th Street, New York, New York defendants JOSE ROSA a/k/a Jose Miguel Rosa Ortiz, JOSE VEGA, a/k/a Jose Hernandez, and RAFAEL A. RODRIGUEZ possessed approximately 241.92 grams of heroin hydrochloride.

4. On or about March 31, 1976, while in the vicinity of apartment 9 of 244 East 106th Street, New York, New York, defendant RAFAEL A. RODRIGUEZ possessed approximately 60.78 grams of heroin hydrochloride.

(Title 21, United States Code, Section 846.)

AL:sr
M-1325

COUNT TWO

The Grand Jury further charges:

On or about the 31st day of March, 1976, in the Southern District of New York, JOSE ROSA, a/k/a Jose Miguel Rosa Ortiz, JOSE VEGA, a/k/a Jose Hernandez, and RAFAEL A. RODRIGUEZ, the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 241.92 grams of heroin hydrochloride.

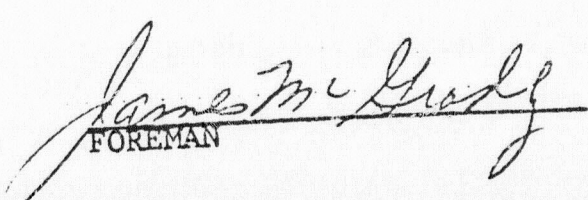
(Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(A); Title 18, United States Code, Section 2.)

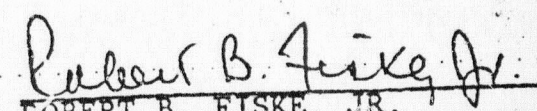
COUNT THREE

The Grand Jury further charges:

On or about the 31st day of March, 1976, in the Southern District of New York, JOSE ROSA, a/k/a Jose Miguel Rosa Ortiz, JOSE VEGA, a/k/a Jose Hernandez, and RAFAEL A. RODRIGUEZ, the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 60.78 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)


FOREMAN


ROBERT B. FISKE, JR.
United States Attorney

SENTENCE
Through Interpreter Richard Schoen

THREE (3) YEARS, on Count 2. Defendant is placed on Special Parole for a term of THREE (3) YEARS, to commence upon the expiration of his confinement pursuant to the provision of Title 21, U.S. Code, Section 841. Counts 1 and 3 are dismissed on motion of defendant's counsel, with the consent of the Government.

Bail continued pending appeal.

COMMITMENT
RECOMMEN-
DATION -

Defendant shall participate in a methadone detoxification program and receive such counselling as the Bureau of Prisons deems appropriate.

Q

SENTENCE

DEFT. RAFAEL A. RODRIGUEZ (ATTY DAVID BLACKSTONE PRESENT)

SENTENCE

SENTENCE
OR
PROBATION
ORDER

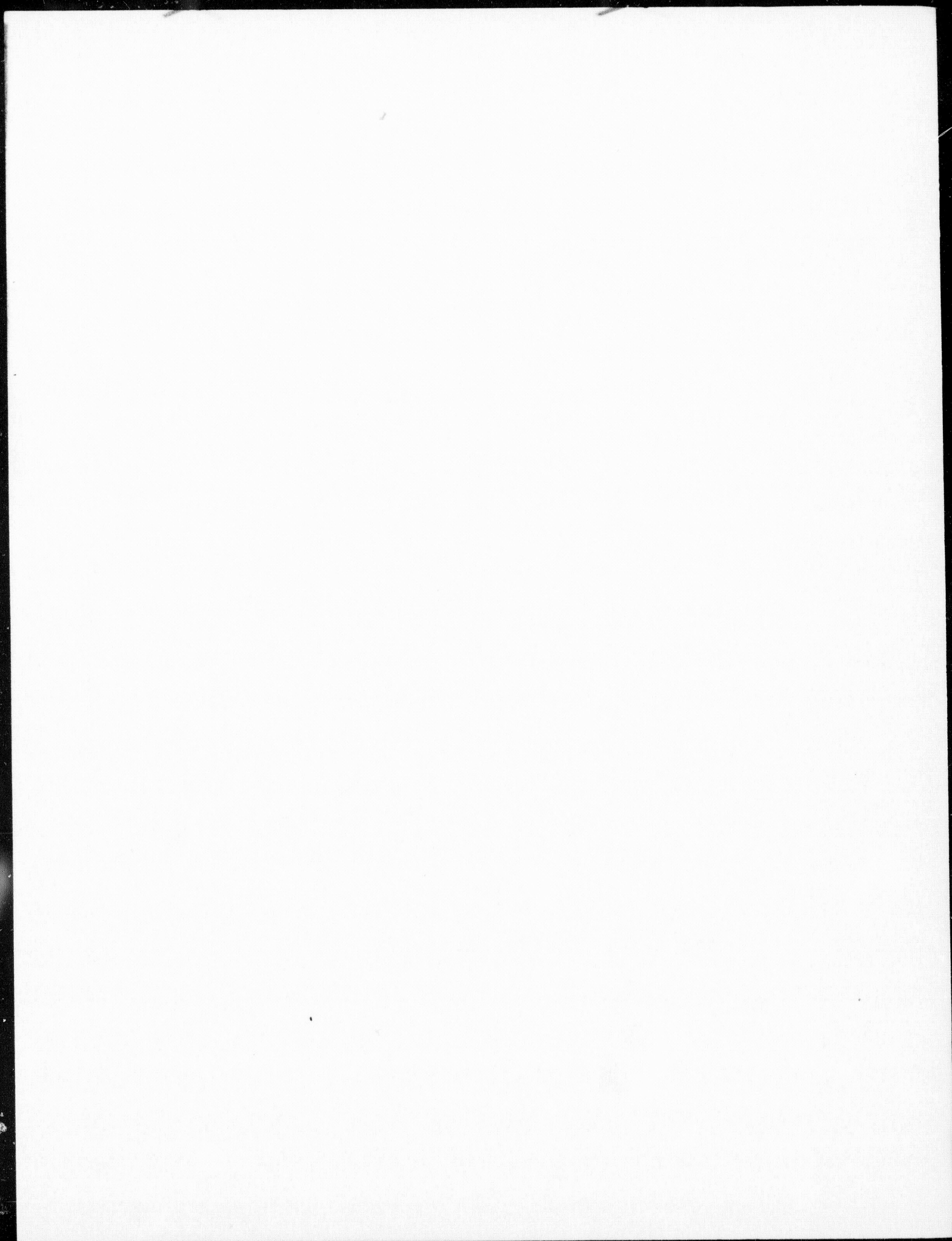
Imposition of sentence is suspended on Count 2. Defendant is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. Counts 1 and 3 are dismissed on motion of the defendant's counsel, with the consent of the Government.

Bail continued pending appeal.

SPECIAL
CONDITIONS
OF
PROBATION

Defendant shall participate in such drug treatment program as is directed by the Probation Department. That defendant shall continue his schooling and make every reasonable effort to obtain and retain employment.

CONNERT
ju



Jan 12, 1976 - ALL DEFTS PRESENT & their attys present
Interpreter Richard Schoen Sworn. Motion to
suppress. DENIED Pre Trial Conference set for
Jan 24, 1976, at 9:30 A.M.
Conner, J.

ALL DEFTS present & their Attys present
Interpreter Richard Schoen Sworn. Trial date
set for Jan 10, 1977 at 10:00 AM
Conner, J.

Jan 5, 1977. DEFTS ROSA AND RODRIGUEZ & their Attorneys
present Interpreter Richard Schoen Sworn for
DEFT ROSA. DEFTS ROSA AND RODRIGUEZ RE: WAIVER
OF TRIAL By Jury - GRANTED - DEFTS ROSA AND
Rodriguez Cont'd on BAIL
Conner, J.

Jan 10, 1977 DEFT VEGA (Attys present) Interpreter R.
Schoen Sworn. DEFT VEGA RE: WAIVER OF TRIAL
By Jury. GRANTED DEFT VEGA \$1,000 P.R.B. SECURED
By \$100.00 Cash Cont'd Special Condition of Bail
That DEFT. Contact U.S. Atty or Probation Dept
WEEKLY. DEFT. to notify U.S. Atty of new change
OF Address or if DEFT. should leave his place
for more than a day at a time. Conner, J.

Jan 13, 1977 DEFTS, ROSA, VEGA & RODRIGUEZ & their
Attorneys present) Suppression Hearing Decision
DEFTS ROSA, VEGA & RODRIGUEZ GUILTY IN
Count 2 P.S. I ordered Sentence Adj'd
to 2/24/77, at 9:30 A.M. DEFTS ROSA, VEGA
& RODRIGUEZ to Report to ALL Pre Trial
Conference every week ALL DEFTS con-
tinued on present bail. (Interpreter Richard Schoen)
Conner, J.

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

JOSE ROSA, a/k/a Jose Miguel,
Rosa Ortiz, JOSE VEGA, a/k/a
Jose Hernandez, and RAFAEL A.
RODRIGUEZ,

Defendants.

INDICTMENT

76 Cr.

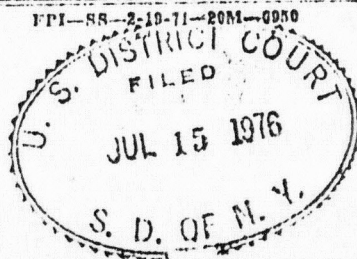
Title 21, U.S.C. § 812, 841(a)(1) and
841(b)(1)(A), §846 and 18 U.S.C.
§ 2.

ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

James M. Guffy
Foreman.



JUDGE CONNER

JUL 22 1976

Wlt. Jose Rosa, not present (att. Elliot Welles not present) Court directs a ~~W/B~~ ^{CHAMLES SIFTON} plea be entered. Case set for Judge Conner for all purposes today for Motions. (Trial day 1-5) P.T.C. 8/20/76. Bail cont'd \$1,000 P.R.B. per. by \$100 Cash

Wlt. Jose Vega not present (att. Edward Chase, present) Ct. directs a ~~W/B~~ plea be entered. Bail cont'd \$1,000 P.R.B. per. by \$100 Cash

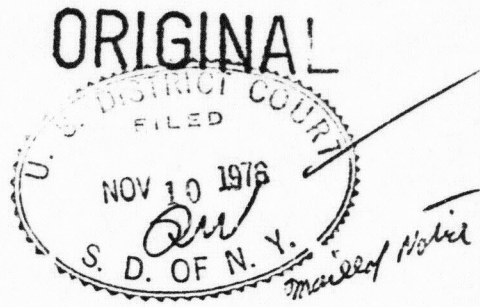
Wlt. Rafael Rodriguez, present (att. David Blackstone, present) Wlt. plea a ~~W/B~~ plea. Bail cont'd \$1,000 P.R.B. per. by \$100 Cash.

Sept. 30, 1976. ALL DEFTS & their Attorneys present
Suppression Hearing - Decision Reserved
(Conner)

over

d3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X

UNITED STATES OF AMERICA, :

Plaintiff, :

- against - :

JOSE ROSA, a/k/a "Jose Miguel Rosa :

Ortiz," JOSE VEGA, a/k/a "Jose :

Hernandez," and RAFAEL H. RODRIGUEZ, :

Defendants. :

----- X

76 Crim. 655
(WCC)

MEMORANDUM
AND ORDER

A P P E A R A N C E S :

HONORABLE ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
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New York, New York 10007

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Assistant United States Attorney,
Of Counsel

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Attorneys for Defendant Rosa
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New York, New York 10005

CHARLES P. SIFTON, ESQ.,
MICHAEL J. WILLIAMS, ESQ.,
Of Counsel

WILLIAM J. GALLAGHER, ESQ.
Federal Defender Services Unit
The Legal Aid Society
Attorney for Defendant Vega
15 Park Row
New York, New York 10038

C
EDWARD T. CHASE, ESQ.,
Of Counsel

DAVID BLACKSTONE, ESQ.
Attorney for Defendant Rodriguez
401 Broadway
New York, New York 10013

CONNER, D. J.:

Defendants in the above-captioned criminal action have been indicted on one count of conspiracy to violate federal narcotics laws, 21 U.S.C. §§ 812, 841(a)(1), (b)(1)(A), and two counts of heroin possession with intent to distribute, 21 U.S.C. §§ 812, 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2. Upon defendants' motions to suppress prosecution evidence derived from a search and seizure that attended their arrest, an evidentiary hearing was held by this Court on September 30, 1976. The testimony adduced at that hearing will be traced in relevant portion below.

It must be noted, at the outset, that the accounts of those who testified for the Government -- the sole witnesses at the hearing -- were neither wholly consistent inter se nor in all respects uniform with prior statements reflected in the

exhibits before the Court. The discrepancies so noted -- minor for the most, if not the whole, part -- have been resolved by assessment of the witnesses' demeanor, candor, experience, and intelligence.

I.

On March 31, 1976, at approximately 8:00 A.M., a confidential informant registered with the Federal Drug Enforcement Agency (the DEA) alerted DEA Special Agent Richard Fiano, apparently by telephone, to a distribution of heroin projected for that morning. At approximately 9:30 A.M., DEA Special Agents Michael Levine, Emilio Garcia, and Robert Joura joined Fiano in an interview of the informant at DEA headquarters. The informant at that time reiterated the narrative that he had previously related to Fiano, i.e., that he had been in the company of one Pipo and one Angel (subsequently identified as, respectively, defendants Rosa and Vega) at the Rios Piedro Social Club, on 105th Street in Manhattan, during the early morning hours of the same day; that he had there observed Pipo's receipt -- from a fourth, unidentified, party -- of approximately one-eighth kilogram of heroin; and that he had been told by Pipo that the drug would be prepared in the latter's apartment for purposes of distribution and would be placed "on the street" by about 11:00 A.M., or at least no later than midday. The informant additionally reported that,

during his visit to Pipo's apartment on the preceding day, he had observed on the premises large sums of money and a number of guns, among which was a .38 caliber revolver belonging to Angel.

Having been apprised of at least so much, Levine, the Acting Group Supervisor, outlined a plan for the arrest of the alleged drug traffickers. As an implement of that plan, the confidential informant was outfitted with an electronic signalling device, concealed on his person, and was instructed to use an alternate, "fail-safe" signal in the event that the electronic device were to malfunction; Levine and Joura, for their part, donned the garb of priests.

Apart from such matters of guise and disguise, the logistics of the operation were simple enough. Levine, Garcia, Joura, and Fiano -- accompanied by the informant and with several additional DEA agents in tow -- left DEA headquarters between 10:30 and 10:40 A.M. and drove toward 244 East 106th Street, the address of Pipo's residence. At some point en route, Garcia directed the informant to telephone that residence with the message that he was "on his way"; after having done so, the informant reported to the agents that he had spoken to Pipo, who had indicated that others were asleep in the apartment. Arriving within view of the targeted address at approximately 11:15 A.M., the agents took up positions for the purpose of surveillance. The informant, alone and on foot,

proceeded toward, and disappeared from the agents' sights into, Pipo's apartment building. It would be an hour or more until Garcia was to spy a motion at Pipo's living room window, the prearranged contingent signal indicating that the informant had seen drugs in the apartment.

Thus, it was sometime between noon and 12:30 P.M. that Levine, Garcia, and Joura -- followed by their brother agents -- sped quietly up the stairs to the top floor of 244 East 106th Street. From the informant's earlier description, the agents recognized an aluminum-fronted door, to the right of the stairwell, as the entrance to Apartment 9, Pipo's railroad flat. The door was several inches ajar; Garcia and Joura would later recall that someone appeared to have been repairing the door or working on its replacement. Levine, in the lead, observed on a kitchen table, just beyond the threshold of the apartment, "glassine type bags and * * * metallic paper."

With revolvers in hand and shields displayed, the agents strode past the partially opened door into the Rosa kitchen, there confronting defendants Rosa and Rodriguez, Rosa's wife, and two unidentified individuals. While Garcia and Levine guarded the persons discovered in the kitchen, Joura proceeded to the living room. There he found defendant Vega asleep on a couch. As Joura pulled Vega to his feet, a .38 caliber "police special" that had been covered by the pillow on which Vega's head had been resting was in turn dislodged and fell to

the floor. Taking control of both the revolver and its owner, Joura directed Vega to the kitchen. By that time, the other agents had joined Levine and Garcia in a search of the individuals who had been placed under arrest in the kitchen.

As a result of the initial search, a pouch containing heroin was removed by Agent Fiano from Rodriguez' jacket pocket. It was at this juncture that Rosa declared, "Everything here is mine. It's all mine. Whatever you find here is mine, you got me good." Garcia thereupon recited the full litany of Miranda warnings, in Spanish, to the congregation of Spanish-speaking arrestees.

When asked by Levine whether there was additional contraband in the apartment, Rosa responded -- in substance, if not in haec verba -- "You have to let everybody else go and just don't tear the house up and I will show you what I got." With that, Rosa led Garcia and Levine to a bedroom dresser and opened one of the dresser drawers, disclosing in the process a box containing packets of heroin and a variety of drug-associated paraphernalia. Asked by Garcia for permission to "look around a little closer," Rosa replied, "As long as you don't break the place up." Rosa then directed the agents to a paper bag concealed behind the living room couch; the bag contained a large sum of money. Rosa next guided the agents to a metal box that was secreted within a stereo unit built along a bedroom wall; the cache included what were, in the above-described

context, the apparent accouterments of narcotics processing, i.e., strainers, measuring spoons, a toothbrush, and a small blender. The agents seized, in addition to the aforementioned items, miscellaneous papers found atop the bedroom dresser; also seized, thereafter, were papers found among defendants' personal effects during the ordinary course of processing at DEA headquarters.

II.

Familiar principles supply the measure of defendants' challenges to the legality of the March 31, 1976 arrests and the searches and seizures that followed in their wake. Thus, we begin from the premise that an arrest is legal only if it is founded on probable cause -- knowledge of such facts as would prompt a reasonable and prudent man to the belief that a crime has been committed or is in progress. Beck v. Ohio, 379 U.S. 89, 91 (1964). The existence or absence of probable cause in turn depends upon a miscellany of circumstances and perforce cannot be gauged with mathematical precision. As the Supreme Court has observed, "In dealing with probable cause, * * * we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men * * * act." Brinegar v. United States, 338 U.S. 160, 175 (1949).

As noted above, the arrests in the present case were prompted by an informant's tip. Probable cause, in such circumstance, must turn on a demonstration (1) that the informant was known by the arresting agents to be reliable and (2) that "the informant either detailed the manner in which the information was gathered or sufficiently described the underlying circumstances so that [the agents] could reasonably believe that the suspect[s were] engaged in criminal activity." United States v. Edmonds, 535 F.2d 714, 719 (2d Cir. 1976).

With respect to the second line of inquiry, this Court is satisfied that the informant's description of the scenario at the Rios Piedro and his report of Pipo's confidences to him were enough to excite the reasonable and prudent to the conclusion that narcotics were being readied for sale at 244 East 106th Street, Apartment 9. As for the informant's credibility, this Court is satisfied as well that the agents' reliance on the informant's word was reasonably founded. By the time of defendants' arrests -- "the crucial moment for determining the existence of probable cause," United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962) -- the informant had been known to Garcia for some six months, following his arrest for a narcotics-related offense; the subsequent identification of his source of drug supply had been confirmed by Garcia's independent investigation. The informant had, to Garcia's knowledge, furnished the New York City Police Department information that

led to the confiscation of weapons involved in the activities of a certain terrorist group. Some weeks prior to March 31, 1976, the informant had alerted Garcia to a frequency of narcotics transactions at the Rios Piedro, information independently corroborated by Garcia. Moreover, additional tips from the informant respecting drug trafficking on the Upper East Side of Manhattan had corresponded with Garcia's personal knowledge of the area. Such a record of prior trustworthiness may support a reasonable reliance on the part of law enforcement officers. See Spinelli v. United States, 393 U.S. 410 (1969); United States v. Rollins, 522 F.2d 160 (2d Cir. 1975). Finally, of course, the narcotics paraphernalia spied by Levine prior to the agents' entry into Apartment 9 bore eloquent witness to the reliability of the informant.

Thus, this is among those cases in which "[t]he cumulative effect of [an] informant's report and * * * independent [law enforcement officers'] corroboration [has been] sufficient to establish probable cause." United States v. Edmonds, *supra*, at 720. Nor is the latter conclusion undermined by the fact that the informant's identity in this case has to date remained undisclosed. In view of the facts as recited above, such non-disclosure is not fatal to the Government's position herein, whether that position be measured against the Second Circuit's most recent pronouncement on the subject, *i.e.*, that "disclosure of an informant's identity is required only when the existence of probable cause depends entirely on the reliability

of the informant," id. (emphasis in original), or by the Second Circuit's earlier observations that "disclosure [is] required only when the informant's story constituted 'the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause'," United States v. Commissiong, 429 F.2d 834, 838-39 (2d Cir. 1970).

Notwithstanding all of the above, defendant Rodriguez urges that at least his own arrest was not bottomed on probable cause. Thus, it is argued that, "No incriminating evidence against Rodriguez was furnished by the informant to the police before the raid or on the scene after the police entered. After police [sic] entry, Rodriguez was not observed committing any crime, nor was any evidence implicating him in crime developed before he was searched." To such extent, at least, Rodriguez invites the Court to disregard the Second Circuit's sensible admonition that "courts should not require law enforcement officials to ignore what is plainly, and legitimately, before them." United States v. Rodriguez, 532 F.2d 834, 839 (2d Cir. 1976). Declining that invitation, this Court concludes that the DEA agents had reasonable enough basis to arrest Rodriguez as well as his companions. The agents had, after all, been alerted -- by the informant's earlier report -- to the probability that drug runners would be present in Apartment 9 at approximately that time. Nor did Rodriguez' stationing at the moment of the agents' entry serve to dispel a reasonable belief that he was not detached from the suspected drug enterprise:

at that moment, Rodriguez was seated at the kitchen table, the trappings of narcotics packaging before him.

III.

Defendants argue, in unison, that the agents' entry into Apartment 9 was illegal because effected without a warrant. That argument rests on a fundamental constitutional principle, i.e., that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions'." Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971), quoting Katz v. United States, 389 U.S. 347, 357 (1968). This is hardly the first court to observe that the exceptions to such general rule are confined within a narrow compass, accommodating only those cases in which there is "'a showing by those who seek exemption * * * that the exigencies of the situation made [a warrantless search] imperative'." Coolidge v. New Hampshire, supra, at 455, quoting McDonald v. United States, 335 U.S. 451, 456 (1949). Furthermore, it may scarcely be gainsaid that probable cause, standing alone, "does not provide the exigent circumstances necessary to justify a search without a warrant." United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973).

On the basis of the record at bar, this Court concludes that the instant case stands among those "jealously and carefully drawn" situations, Jones v. United States, 357 U.S. 493,

499 (1958), that validate warrantless searches. For here the agents believed -- and, more to the present point, this Court is convinced of the reasonableness of their belief -- that the delay entailed in obtaining a warrant would in all likelihood have prevented them from "arresting" not defendants alone, but rather, the "destruction of the evidence" as well. Schmerber v. California, 384 U.S. 757, 770 (1966). "Destruction" in the present case would have been of the most damaging nature, that is, commercial distribution.

Although defendants argue with some vigor that a warrant might have been secured in the present case without such cost, the testimony elicited at the hearing tends to prove otherwise. Thus, according to Levine, the engineer of the March 31, 1976 operation, it had been his experience that a warrant could not be obtained in the Southern District of New York in less than four or five hours under the most efficient circumstances; under average circumstances, Levine testified, a warrant could not be had in this district in less than a day. In view of the reported imminence of the narcotics sales, Levine reasonably enough declined to initiate an application for a warrant, an application that would have been -- according to Levine's own experienced lights -- no more than a futile exercise.

With so much concluded, defendants' challenge to the admissibility of certain fruits of the March 31, 1976 search necessarily fails. Thus, the search of Rodriguez' person finds

sanction in the well-established rule that

"When an arrest is made it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. * * *. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." Chimel v. California, 395 U.S. 752, 763 (1969).

It is no less clear that the items found on Rosa's kitchen table and the revolver retrieved from the living room floor fall squarely within the "plain view" exception to the warrantless-search rule. In the light of this Court's earlier determination, there is no relevance here for the Coolidge Court's instruction that "where the police have ample opportunity to obtain a search warrant and the intention to seize the evidence is really the prime motive for the arrest, the plain view exception does not apply," United States v. Lisznyai, 470 F.2d 707, 710 (2d Cir. 1972), cert. denied, 410 U.S. 987 (1973). Nor can Joura's seizure of the Vega "police special" be condemned as the product of a general exploratory intrusion. Given the informant's report respecting the guns harbored in Apartment 9, and the other persons asleep there, it was reasonable caution that directed Joura to proceed through the railroad flat, to the living room at its rear, to commandeer any remaining person or persons having access to the reported weapons.

IV.

Yet to be considered is the admissibility of the remaining items found by the agents in Apartment 9. With respect to these, defendants contend, suppression is mandated by the absence of a voluntary consent to search.

This Court is mindful, as it must be, that the voluntariness of a consent to search cannot be inferred lightly, but rather, must be demonstrated by "clear and positive evidence." United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), cert. denied, 372 U.S. 906 (1963). See Johnson v. Zerbst, 304 U.S. 458 (1938); United States v. Boukater, 409 F.2d 537 (2d Cir. 1969); United States v. Como, 340 F.2d 891 (2d Cir. 1965). Thus, on a motion to suppress, it is the Government's burden to prove that the "totality of the circumstances" reflects a consent that was "essentially free and unconstrained." United States v. Watson, 44 U.S.L.W. 4112, 4116 (U.S. January 26, 1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); see United States v. Miley, 513 F.2d 1191, 1201-02 (2d Cir.), cert. denied, 96 Sup. Ct. 74 (1975). Furthermore, a consent is not voluntary unless it has been "unequivocal, specific, and intelligently given." United States v. Smith, supra, at 663. And, although "[t]he fact of custody does not alone preclude the giving of a voluntary consent, * * * , * * * it should require more careful scrutiny." United States v. Wiener, Docket No. 75-1218 (2d Cir. March 24, 1976).

That the above-recited guidelines are not always easily applied is unhappily demonstrated by the case at bar. After all, the search at issue transpired in a context that might ordinarily and readily be deemed inherently coercive, following as it did the sudden intrusion by armed officers into the Rosa residence. The arrests were, to be sure, speedily effected, but probably no less disquieting for such expedition.

Nonetheless, this Court is impelled to the conclusion that Rosa's consent to the search of his apartment was offered freely, knowingly, and without equivocation. That conclusion is founded, necessarily, upon the surrounding circumstances in their entirety. Although armed, the agents do not appear to have threatened Rosa, either expressly or impliedly; nor did they practice any form of deception upon him. Rather, the agents addressed Rosa in words of inquiry and request. Moreover, the Miranda warnings had been administered to Rosa in his native language. In word and action, Rosa appeared to have been alert, certainly enough so to have understood the Miranda admonition respecting his right not to incriminate himself; indeed, Rosa had summoned enough wit -- and pluck -- to condition the search upon the officers' care not to disturb his household effects unnecessarily. Added to all the above were F... spontaneous declarations of guilt and his affirmative assistance in the search; as Garcia noted at the hearing, "Mr. Rosa was with us as we looked around, after he gave us consent. He was with us constantly." See United States v. Smith, supra, at 663-64.

Thus, all of the relevant evidence, as a totality, reflects a voluntary consent on Rosa's part to the search and consequent seizures.

For the reasons discussed above, defendants' motions are denied in all respects.

SO ORDERED.

William E. Conner
United States District Judge

Dated: New York, New York

November 10, 1976

CERTIFICATE OF SERVICE

June 7, 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Steven Lloyd Barnett

